



**Information
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Marlene H. Dortch, Secretary

Federal Communications Commission

Office of the Secretary

445 12th Street, SW

Washington, DC 20554

Request for Waiver

CC Docket No. 02-6

February 15, 2011

Decision being addressed: Administrator's Decision on Appeal
Letter Dated January 10, 2011

Form 471 Application Numbers: 695092

FRNs: 1908696

Funding Years: 2009

Billed Entity Number: 142119

Dear Ms. Dortch:

On November 3, 2010 APS received commitment adjustment letters for FRNs 1452680, 1589584, and 1752981 that rescinded funding due to a perceived competitive bidding violation discovered during our FY 2009 Selective Review. On December 10, 2010 we appealed the COMADs to USAC and also appealed the denial of FY

2009 FRN 1908696 that is the subject of this request for review¹. On January 10, 2011, USAC rejected our 2009 appeal as being outside of the window to appeal². The appeal of the COMADs is pending with USAC and we are confident they will be granted.

We humbly request the FCC direct USAC to correct the error it made in the original processing of our FY 2009 request. We acknowledge the appeal was not filed within 60 days of the original decision letter; however, we are unable to find a reference in the FCC rules that provides a time limitation for when USAC can correct its own errors. If the FCC rules do set a limitation on the time period for USAC to correct its errors, we request the FCC waive the 60-day window to appeal. We feel our request meets the standard set forth in the Greenfield Decision to waive the 60-day appeal filing deadline. As described in more detail below, APS feels its request should be granted because:

- USAC's decision to deny funding was contrary to direction the FCC provided in DA 09-825, which was released nine months before USAC issued its decision on FRN 1908696.
- The person responsible for filing the appeal was new to the position and unaware of the appeal process and assumed the decision of the administrator was correct.
- The recent COMADs USAC issued relating to this procurement effectively re-opened the window to appeal the underlying decision.

Background:

On January 20, 2005, APS posted Form 470 366990000539469 and, among other services, APS sought bids on district-wide PRI services. After posting these services for 28 days, APS decided to enter into a five-year contract for these services with Qwest Corporation (SPIN 143005231). The contract was awarded on February 17, 2005 and was valid through June 30, 2010. APS requested funding on this contract each year and each year up until FY 2009 it was funded by USAC.

In FY 2009 APS was selected for a Selective Review and during that review APS was informed that FRN 1908696 (the fourth year of the five-year PRI contract) had a potential flaw. The reviewer indicated:

The cited Form 470 did not indicate your intent to seek: the voluntary contract extension and/or the multi-year contract. FCC rules require the applicant to indicate on its Form 470 and/or RFP its intent to enter into a multi-year contract for services or a contract that

¹ See Attachment A for copy of December 10, 2010 Appeal to USAC

² See Attachment B for copy of the Administrator's Decision on Appeal Letter

includes voluntary extensions. This competitive bidding requirement was not met, therefore your FRN will be denied.

In response to this inquiry APS indicated:

We did some checking on the 470 which was originally posted 1/20/05. If I understand your question correctly, I am looking at question #13. In reading this question, it states: "If you intend to enter into a multi-year contract based on this posting or a contract featuring an option for voluntary extensions you may provide that information below.

Our interpretation is that it indicates you "may provide", not that you must provide this information. Therefore, it was not included on the Form 470. We could not find any other place where this was mentioned.

Apparently the fact that APS fully complied with the Form 470 instructions did not sway the reviewer and on December 30, 2009, the funding request was denied because "...the cited Form 470 did not indicate your intent to enter into a multi-year contract for the services and does not meet the 28 day competitive bidding requirement."

While APS is now fully aware of the appeal deadline, when the original decision was issued we were unaware of the appeal deadline or the appeal process. In September 2009, APS was in a state of flux as the person that handled E-rate for several years suddenly left the district. At that time, I assumed responsibility for the E-rate process and was thrown directly into the "frying pan." We were in the midst of a selective review and preparing to file for the FY 2010, which can be challenging for someone new to the program.

As the FCC has acknowledged through its wonderful efforts to streamline and simplify the program, E-rate can be overwhelming for someone new to the process or even the experienced applicant. When we received this decision we: 1) did not realize we had the ability to appeal the decision, and 2) incorrectly assumed that USAC's decision was correct. We do understand the importance of deadlines in the effective administration of the program. However, we feel the recent COMAD letters we received have effectively reopened this decision.

The establishing Form 470 for these requests, Form 470 #366990000539469, was filed using the OMB-Approved Form dated May 2003. Unlike the November 2004 OMB approved version of the Form 470, the May 2003 version of the Form 470 did not include check boxes for the applicant to indicate its desire to enter into a multi-year contract.

As opposed to check boxes, the May 2003 version of the Form 470 in Item 13 simply indicated:

If you intend to enter into a multi-year contract based on this posting or a contract featuring an option for voluntary extensions you **may** provide that information below. If you have plans to purchase additional services in future years, or expect to seek new

contracts for existing services, summarize below (including the likely timeframes).
(emphasis added)

The use of the word “may” as opposed to “must” demonstrates that the FCC did not intend this to be a requirement, but rather information the applicant could choose to add to the Form 470. Additionally, the Form 470 instructions do not indicate that the applicant “must” include this information. Instead the Form 470 instructions again indicate the optional nature of any information on the term of the contract.

In FCC Order DA 09-825, the FCC affirmed that Item 13 was not intended to be a requirement. It is important to understand that the FCC did not waive its rules, but rather indicated the applicants were “were in compliance with our competitive bidding rules.”

In paragraph ten of the Order, the FCC indicated:

Appeals Granted on Merits. Nine petitioners did not indicate they were posting for a multi-year contract or a contract with a voluntary renewal provision when they originally posted their FCC Forms 470.⁴⁶ Because these petitioners failed to include this information in their FCC Forms 470, USAC treated their E-rate applications in subsequent years as if they had not been subject to competitive bidding and were thus in violation of the Commission’s rule requiring applicants to post requests for services for 28 days. **In fact, these petitioners were in compliance with our competitive bidding rules when their requests for service were initially posted because the FCC Form 470 in effect at the time did not require an applicant to disclose whether it was seeking a contract with terms of more than one year.**⁴⁷ Applicants are not required to rebid multi-year contracts each year.⁴⁸ Accordingly, we grant and remand these appeals to USAC for further processing consistent with this order.⁴⁹ (emphasis added)

In footnote 47, the FCC explained that, as Aurora had explained to the Selective Reviewer, in Item 13 of the Form 470 “applicants ‘may provide’ information on the intent to enter into a multiyear contract or a contract featuring an option for voluntary extensions.” Clearly the October 2004 version of the Form 470 does require applicants to check a box indicating their intent to enter into a multi-year contract, but no such requirement existed on the May 2003 version.

It is our assumption that the reviewer incorrectly applied the rules associated with the October 2004 version of the Form 470 to Aurora’s Form 470 that was filed using the May 2003 version. It should be noted that the decision to deny the FY 2009 request came nearly a full nine months after the FCC had informed USAC that they improperly applied the May 2003 Form 470 instructions.

We feel it is clear that USAC erred in its decision to deny our FY 2009 request and it failed to consider the guidance provided in DA 09-825. Therefore, we request the FCC direct USAC to

correct the error it made in the processing of the Form despite the fact the decision was not appealed within 60 days of the original decision.

If you have questions regarding this appeal please contact our E-rate Consultant. His contact information is below.

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Sincerely,

A handwritten signature in black ink, appearing to read "Susan Collins". The signature is fluid and cursive, with the first name "Susan" and last name "Collins" clearly distinguishable.

Susan Collins

Aurora Public Schools